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No.

In the Supreme Court of the United States

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G. individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,
Appellants

v.

CONSOLIDATED RAIL CORPORATION,
Appellee

On Appeal From the United States Court of Appeals for the Third Circuit.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Does the Boiler Inspection Act prempt the states from enforcing legislation requiring devices which are purely experimental in nature?

II. Has the F.R.A. issued a rule, regulation, order or standard covering the same subject matter as 66 Pa. C.S. §2705?

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JURISDICTIONAL STATEMENT
IN THE SUPREME COURT OF THE UNITED STATES

No.——

PENNSYLVANIA PUBLIC UTILITY COMMISSION: SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission, CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

v.

CONSOLIDATED RAIL CORPORATION

Appellees

On Appeal From the United States Court of Appeals for the Third Circuit.

JURISDICTIONAL STATEMENT

Appellants Pennsylvania Public Utility Commission, Susan M. Shanaman, Chairman, James H. Cawley, Commissioner, Michael Johnson, Commissioner, Linda C. Taliaferro, Commissioner, John G. Alford, Director of Safety and Compliance and John B. Wilson, Director of Operations bring this appeal from the order and final judgement entered on November 16, 1982 by the United States Court of Appeals for the Third Circuit which affirmed the lower court's opinion which held that section 2705 of the Pennsylvania Public Utility Code (66 Pa. C.S. §2705) conflicted with federal law in violation of Article VI Clause 2 of the Constitution. Section 2705 of the Pennsylvania Public Utility Code provides that locomotives operating within the state must be equipped with speedometers and speed recorders.

This appeal presents a substantial federal question of federal-state relations which merits plenary review. Appellants respectfully request this Court to note jurisdiction and permit the filing of briefs and the presentation of oral argument on the substantial question presented.

CITATION TO OPINION BELOW

The opinion of the District Court is reported at 536 F. Supp. 653 (E.D. Pa. 1982). The appellate Court for the reasons set forth in the District Court opinion affirmed without separate opinion. The final order of the appellate Court is not published but is included in the appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254 (2) in that this appeal is taken from an order by the Court of Appeals holding that a state statute (66 Pa. C.S. §2705) was invalid as repugnant to the Constitution and Laws of the United States. This appeal is timely in that this action was filed August 11, 1980, the decision of the Court of Appeals entered November 16, 1982, and the final order of the Court of Appeals was entered December 13, 1982. This appeal was taken on February 10, 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

66 Pa. C.S. §2705 as amended 1978, November 26, P.L. 1241, No. 294, effective in 60 days, is the statute whose validity is involved in this action. The pertinent subsection is set forth below and the entire Section is set forth in the Appendix.

§2705. Speedometers and speed recorders

(a) General rule — No railroad locomotive shall be operated in excess of 30 miles per hour in this Commonwealth without a device or devices making a record of the speed at which the locomotive is traveling and providing the engineer or operator of the locomotive with a view of such speed. Both devices shall be functioning correctly within four miles per hour.

Boiler Inspection Act, 45 U.S.C. §§23-34 (1976). The pertinent section is set forth below.

§23. Use of unsafe locomotive and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of

sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Feb. 17, 1911, c. 103, §2, 36 Stat. 913; Mar. 4, 1915, c. 169, §1, 38 Stat. 1192, June 7, 1924, c. 355, §2, 43 Stat. 659.

Federal Railroad Safety Act, 45 U.S.C. §434. The pertinent section is set forth below.

§434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. Pub. L. 91-458, Title II, §205, Oct. 16, 1970, 84 Stat. 972.

STATEMENT OF THE CASE

On August 11, 1980, Consolidated Rail Corporation, hereinafter referred to as "ConRail", brought suit in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of Pennsylvania's Speedometer and Speed Recorder Law, 66 Pa. C.S. §2705 as amended 1978, November 26, P.L. 1241, No. 294.[1]

Suit was filed against the Pennsylvania Public Utility Commission, hereinafter referred to as "PUC", the Commissioners of the PUC in their official and individual capacity and the Directors of Safety and Compliance and of Operations of the PUC in their official and individual capacity.

ConRail challenged the constitutionality of 66 Pa. C.S. §2705, asserting that the Pennsylvania law, if enforced, would be contrary to federal law,[2] has been preempted by said federal law and furthermore, violates the Supremacy Clause[3] and the Fourteenth Amendment of the United States Constitution.

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[1] Requires railroad locomotive operated in execess of 30 miles per hour in the Commonwealth of Pennsylvania, not operated exclusively within designated yard limits in switching or transfer service, to be equipped with speedometers and speed recorders.

[2] Boiler Inspection Act, 45 U.S.C. §§22-34 Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* Federal Railroad Safety Act, 49 U.S.C. §434.

[3] U.S. Const. Art. VI, Clause 2.

On September 4, 1980 a motion to dismiss was filed by the PUC on the grounds that the complaint failed to show the existence of an actual controversy between the parties as required by Article III of the United States Constitution and Section 2201 of the Judicial Code, Title 28. PUC had not at any time initiated enforcement proceedings against ConRail under §2705. In fact, a determination has never been made by the PUC that ConRail was not in substantial compliance with 66 Pa. C.S. 2705.

The District Court granted plaintiff's motion for summary judgement. The PUC immediately appealed to the United States Court of Appeals for the Third Circuit, which affirmed the District Court and entered final judgement on November 16, 1982, without delivering an opinion. Petition for rehearing was denied December 13, 1982.

In the District Court's opinion, on which the appellate Court relied, the Court held that the Pennsylvania law was preempted by the Federal Railroad Safety Act based on a determination (without benefit of legal authority) that speedometers and speed recorders were the same "subject matter".[4] In addition, the Court held that the Pennsylvania Law was preempted by the Boiler Inspection Act based on a determination (without benefit of legal authority) that a speed recorder is an appurtenance.[5]

On February 10, 1983, the Public Utility Commission initiated this appeal.

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[4] See p. 3a, infra.

[5] See p. 3a, infra.

THE QUESTION IS SUBSTANTIAL

I. Does the Boiler Inspection Act preempt the States from enforcing legislation requiring devices which are purely experimental in nature?

The state statutory provisions found by the Court below to be unconstitutional provide essentially that all locomotives operating in the Commonwealth of Pennsylvania be equipped with speed recorders. The Court below relied on the reasoning of the District Court which held that since the state statute regulated locomotive equipment, it was therefore preempted by the Boiler Inspection Act.

The Court below assumed that this Court's decision in *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926), clearly delineated all of the parameters of the Boiler Inspection Act. However, it disregarded this Court's decision in *Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936), which held that experimental devices were not devices which fell within the scope of the Boiler Inspection Act. It is impossible to conceive that Congress in 1915 as it amended the Boiler Inspection Act thought to encompass sophisticated experimental devices such as speed recorders within the purview of the Act. As stated by the F.R.A. at 44 Fed. Reg. 29610, "the state of the art for locomotive speed recorders has yet progressed to a point in which it is practical to mandate their universal application". Therefore, speed recorders, by their experimental nature, cannot be considered a part of the locomotive or its appurtenances under Section 23 of the Boiler Inspection Act, and, therefore, are not preempted from regulation by the States.

It is, therefore, necessary that this Court note jurisdiction in this case to resolve the questions herein raised which are fundamental to the basic concepts of federalism embodied in our Constitution.

II. Has the F.R.A. issued a rule, regulation, order or standard covering the same subject matter as 66 Pa. C.S. §2705?

The express language of Section 205 of the Federal Rail Safety Act permits a state regulation to stand until the Secretary of the F.R.A. has acted relative to the precise subject matter covered by the state regulation.

The regulations promulgated on March 31, 1980 by the F.R.A. at 49 C.F.R. Part 229, §229.117 states:

> (a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a *speed indicator.* (Emphasis supplied.)

As is clearly indicated, speed recorders are not included in the regulation. The F.R.A. discussion of speed recorders (Federal Register, Vol. 44, No. 99, pp. 29610-29611) is an unambiguous statement that the Administration has currently chosen not to regulate on this subject. It belies common sense that such language can be interpreted to mean that the F.R.A. has indeed promulgated anything in regard to speed recorders within the parameters of §205 of the Federal Rail Safety Act.

The Court below relying again on the District Court's reasoning failed to note the significant difference between a speed recorder and a speedomoter and, therefore, held

that regulation of both devices is regulation of the same subject matter—speed indication or speed control. A speedometer or speed indicator is a relatively simple device which gives an observer or operator a continuous reading of a vehicle's velocity. A locomotive speed recorder on the other hand is a rather sophisticated device employing the use of an electromagnetic encoder to imprint on a tape magnetic signals, which when decoded by the proper equipment, can indicate a vehicle's relative speed, location, throttle position, brake application, and whether the horn has been sounded. The Court nevertheless held that regulation of both devices is regulation of the same subject matter—speed indication or speed control. This holding is completely without legal precedent. The District Court cited its own dicta in *Adkins v. Dirickson,* 523 F. Supp. 1281, 1283 (E.D. Pa. 1981), for the proposition that a speed recorder in essence is a recording speedometer. As a result, the Court below erred in adopting the District Court's reasoning in this regard.

It is essential that the Commonwealth of Pennsylvania continue to enforce the provisions of 66 Pa. C.S. §2705 requiring the use of speed recorders on locomotives operating within the Commonwealth for the continued protection of the involved employees of Conrail and state residents. For this reason and previously mentioned concepts of Federalism, it is strongly urged that this Court review the opinion in this case.

CONCLUSION

Based upon the foregoing arguments and authorities, it is requested that this Court note jurisdiction in this appeal, receive full briefs on the merits, and hear oral arguments in order to resolve the substantial questions which are involved.

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IN THE SUPREME COURT OF THE UNITED STATES

No.——

PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL.

Appellants

v.

CONSOLIDATED RAIL CORPORATION,

Appellees

I, JOHN J. GALLAGHER, Assistant Counsel for the Pennsylvania Public Utility Commission, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date March 11, 1983, three copies of Appellants' Jurisdictional Statement and Appendix to the persons listed below:

Henry H. Perrett, Jr., Esquire
Hermon M. Wells, Esquire
John R. Jenchura, Esquire
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Thomas P. Shearer, Esquire
711 Frick Building
Pittsburgh, PA 15219

I further certify that all parties required to be served in this appeal have been served.

JOHN J. GALLAGHER
Assistant Counsel

APPENDIX A

§2705. Speedometers and speed recorders

(a) General rule.—No railroad locomotive shall be operated in excess of 30 miles per hour in this Commonwealth without a device or devices making a record of the speed at which the locomotive is traveling and providing the engineer or operator of the locomotive with a view of such speed. Both devices shall be functioning correctly within four miles per hour.

(b) Exceptions.—Locomotives operated or used exclusively within designated yard limits in switching or transfer service need not be equipped in accordance with the provisions of this section. Locomotives while being used in commuter passenger service need not be equipped with a speed recording device.

(c) Notification of compliance.—Each railroad shall notify the commission of the date that each locomotive comes into compliance with the provisions of this section. The notification shall state the serial number or other identification of the locomotive.

(d) Schedule of regulated locomotives.—Each railroad affected by the provisions of this section shall maintain at a designated location a list or schedule of the locomotives referred to in this section. It shall set forth, along with other information, the date that the device or devices referred to in subsection (a) were calibrated and found to be functioning in accordance with the provisions of this section. It shall advise the commission as to such location.

In the event of an accident during the operation of a locomotive or in the event of a disciplinary proceeding in which a railroad employee is charged with excessive speed, the record required by this section showing the speed at the time and place involved shall be retained by the railroad, at a location made known to the Public Utility Commission, until permission to destroy them has been granted by the commission or otherwise permitted in accordance with a rule, regulation or order of the commission. In any disciplinary proceeding in which a railroad employee is charged with excessive speed in the operation of a locomotive equipped with a speed recorder the railroad may not introduce other evidence of such speed unless the record has been retained in compliance with this subsection.

(e) Enforcement.—The commission shall enforce the provisions of this section and may issue such order or orders as may be proper to require compliance therewith. 1978, July 1, P.L. 598, No. 116, §2705, effective in 60 days. As amended 1978, Nov. 26, P.L. 1241, No. 294, effective in 60 days.

1978 Amendment: In fourth sentence of subsection (d), substituted phrase "until permission to destroy . . . order of the commission." for "for a period of six months after said accident or disciplinary proceeding."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 80-3147

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
et al.

MEMORANDUM

GILES, J., APRIL 14, 1982

By statute, Pennsylvania requires locomotives to have speed records and indicators. 66 Pa. Cons. Stat. §2705 (1978).[1] Plaintiff railroad, contending that the statute is

[1] That section states that:

No railroad locomotive shall be operated in excess of 30 miles per hour in this Commonwealth without a device or devices making a record of the speed at which the locomotive is traveling and providing the engineer or operator of the locomotive with a view of such speed. Both devices shall be functioning correctly within four miles per hour.

preempted by federal law, sues the state[2] for a declaration that the statute is unconstitutional under the supremacy clause, U.S. Const. art. VI, cl. 2. Before me is plaintiff's motion for summary judgment. For the reasons which follow, the motion is granted.

The railroad contends that the state statute conflicts with two federal statutes, the Locomotive Boiler Inspection Act, 45 U.S.C. §23 (1976), and the Federal Railroad Safety Act, *id.* §434, and a federal regulation, 49 C.F.R. §229.117 (1980). The railroad argues that the Locomotive Inspection Act totally preempts the field of locomotive equipment, barring any state regulation of that subject. Alternatively, the railroad argues that the state statute is independently preempted by the test of the Railroad Safety Act, because a federal rule covers the same subject matter as the state statute.

The state argues that Congress has redistributed railroad regulatory authority so that the total-preemption test of the Locomotive Inspection Act is no longer valid. It contends that the correct tests are those stated in the Railroad Safety Act. State regulation of speed recorders allegedly meets those tests because it does not cover the same subject matter as the federal regulation, or, if it does over-

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66 Pa. Cons. Stat. §2705(a) (1978). Other subsections: require railroads to notify the state Public Utility Commission, and keep records, of compliance, *id.* §(b)-(c); give rules for evidentiary use of speed records in disciplinary hearings, *id.* §(c); and give enforcement powers to the Commission, *id.* §(d).

I note that because the statute exempts yard and commuter locomotives, *id.* §(b), it would not help reconstruct commuter-rail accidents.

[2] The named defendants are the Pennsylvania Public Utility Commission (the state body charged with enforcing the statute), its commissioners, and some of its officials.

lap, because it comes within the statutory exception of the Railroad Safety Act.[3]

I. LOCOMOTIVE INSPECTION ACT

In the landmark *Napier* case, the Court held that Congress intended the Locomotive Boiler Inspection Act to occupy totally the field of locomotive equipment.[4] The

[3] The state does not defend its regulation of speed indicators, presumably because preemption is obvious. *Compare* 66 Pa. Cons. Stat. §2705(a) (quoted in note 1 *supra*) *with* 49 C.F.R. §229.117 (a) (quoted in note 16 *infra*).

I note that the cause of action arises under the Declaratory Judgment Act, 28 U.S.C. §2201, and that jurisdiction exists under 28 U.S.C. §1331. Plaintiff has standing because it would suffer legal "injury" if the state law were enforced. Despite the absence of a specific statutory penalty, the action is ripe because of the possibility of enforcement of the law under 66 Pa. Cons. Stat. §§502 & 503, and because the only factual development needed for adjudication is the minimal amount supplied by the parties. Plaintiff is a "common carrier" as defined in the Locomotive Inspection Act, *see* 45 U.S.C. §22, and a "railroad" subject to the Railroad Safety Act, *see id.* §434; S. Rep. No. 91-619, 91st Cong., 1st Sess. 6 (1969). Plaintiff is covered by, and in violation of, the state statute. *Pullman*-type abstention is inappropriate because the state statute's meaning and validity under state law are undisputed. Finally, *Younger*-type abstention is inappropriate because there are no ongoing state enforcement proceedings. *See also* Memorandum (Nov. 12, 1980) (denying motion to dismiss for lack of subject-matter jurisdiction).

[4] In *Napier*, the Court invalidated state regulations of locomotive equipment. The Court decided that the regulations were valid exercises of the states' police power, and assumed that there was no actual conflict between state regulations and federal law. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 610-11 (1926)

Act, by itself, thus preempts state regulation of locomotive equipment. The state concedes that this was Congress's intent in passing the Locomotive Inspection Act.[5] The state, however, argues that "the rule of *Napier* . . . has been abrogated" by the Federal Railroad Safety Act, 45 U.S.C. §434. *See* State's Brief, *supra* note 5, at 2. Thus, the question whether the state statute is preempted by the Locomotive Inspection Act turns on whether the latter act's preemptive purpose was modified by the Railroad Safety Act.

Prior to passage of the Railroad Safety Act, federal law governed only a few areas of railroad safety. Congress found that this spotty federal coverage resulted in numerous preventable accidents. To remedy this problem it passed the Federal Railroad Safety Act. The Act aimed to

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(Brandeis, J.). The validity of the state regulations thus hinged on the answer to the question: "Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment?" *Id.* 611. The Court answered that "the power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* Thus, the Act, even absent exercise of federal regulatory power "was intended to occupy the field." *Id.* at 613; *accord, Norfolk & W. Ry. v. Brotherhood of Locomotive Eng'rs*, 459 F. Supp. 136, 144 (W.D. Va. 1978); *see Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 n. 2 (1960).

Regulatory authority under the Act since has been transferred from the ICC to the Secretary of Transportation. *See* 45 U.S.C. §28; 49 U.S.C. §1655(e)(1)(E). I also note that the Act is variously known as the "Locomotive Boiler Inspection Act," the "Boiler Inspection Act," and the "Locomotive Inspection Act." I shall use the last term.

[5] *See* Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 1 [hereinafter cited as State's Brief].

promote railroad safety by insuring "broad Federal regulatory authority over all areas of railroad safety,"[6] and promoting "nationally uniform" railroad-safety standards.[7] While expanding the field for federal regulation, Congress also stated a narrower rule governing preemption of state law.[8] The state contends that this rule operates to limit the scope of preemption of the Locomotive Inspection Act.

That a reasonably strong argument exists in favor of the state's position is shown by Justice Roberts' opinion in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 118-23, 413 A.2d 1037, 1042-44 (1980) (state law requiring flush toilets in locomotives not preempted by Locomotive Inspection Act because Railroad Safety Act changes preemption test). I, however, disagree with the state's argument for two reasons. First, the legislative history of the Railroad Safety Act shows that Congress intended no change to the Locomotive Inspection Act. Second, elimination of the total-preemption test for locomotive equipment runs contrary to the purpose of the Railroad Safety Act.

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[6] H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 11, [hereinafter cited as H. Rep.], *reprinted in* 1970 U.S. Code Cong. & Ad. News 4104, 4108; *see* 45 U.S.C. §421 ("promote safety in all areas of railroad operations"); H. Rep., *supra*, at 7-8, 73, 75, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4105, 4127, 4129; S. Rep. No. 91-619, 91st Cong., 1st Sess. 1, 5-6 (1969) [hereinafter cited as S. Rep.].

[7] 45 U.S.C. §434; *see, e.g., National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1111 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); H. Rep., *supra* note 6, at 19, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4116-17; S. Rep., *supra* note 6, at 8-9, 19.

[8] That rule comprises 45 U.S.C. §434. *See* note 15 *infra* & accompanying text.

In passing the Railroad Safety Act, Congress could have repealed the Locomotive Inspection Act, or recodified or subsumed it within the comprehensive Railroad Safety Act.[9] Instead, Congress concluded that the Locomotive Inspection Act was working well, and specifically determined to keep it independently in force "without change."[10] These decisions negate implied modification of any part of the Locomotive Inspection Act, including its total occupation of the locomotive-equipment field.[11]

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[9] *See, e.g.*, S. Rep., *supra* note 6, at 11, 24 (proposed S. 1933, 91st Cong., 1st. Sess. §107 (1969), would have repealed miscellaneous railroad-safety laws); *id.* at 16 (letter from Sec'y of Transp. James M. Beggs to Sen. Warren G. Magnuson (Dec. 2, 1969), recommending deferred repeal of Locomotive Inspection Act).

[10] As stated in the House Report:

> Over the years there have been several enactments of legislation dealing with certain phases of railroad safety. These include, among others . . . [the] Locomotive Inspection Act. . . .
>
> They are set forth in appendix B of this report. These particular laws have served well. In fact the committee chose to continue them without change.

H. Rep., *supra* note 6, at 7-8, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4105; *see* S. Rep., *supra* note 6, at 11.

[11] *See e.g., TVA v. Hill*, 437 U.S. 153, 189-90 (1978) (disfavor of implied repeal is cardinal rule, intent to repeal must be clear and manifest); *United States v. United States Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976) (disfavor of repeal by implication carries special weight when argument is that general statute repealed specific one).

The continued independent vitality of the Locomotive Inspection Act is shown by the fact that the regulations cited in this case were adopted under the substantive and regulatory authority of that Act, 45 U.S.C. §§22-23 & 28. *See* 49 C.F.R. preceding

In expanding the scope of federal rule-making authority in the Railroad Safety Act, Congress allowed the states to continue regulating until displaced by federal rules in the same area.[12] The continued validity of state rules in areas that had always been subject to state regulation does not make railroad regulation less uniform than in the past. Thus, the new preemption rule, as applied to new areas of federal railroad regulatory jurisdiction, does not impair the congressional purpose of uniform regulation.

In contrast, in areas already governed by the Locomotive Inspection Act, the states had no regulations. If the Railroad Safety Act were to change the preemption test for those areas, the states could expand their regulatory authority, allowing a new reservoir of differing, and possibly incompatible, railroad-safety law.[13] This would run counter

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§229.1; 45 Fed. Reg. 21,092, 21,110 (1980) (adoption of final rule); 44 Fed. Reg. 29,605-06 (1979) (notice of proposed rulemaking). In contrast, the advance notice of proposed regulation invoked also the authority of the Railroad Safety Act, 45 U.S.C. §431. *See* 39 Fed. Reg. 4930 (1974).

I also note that under the authority of the Locomotive Inspection Act, the Federal Railroad Administration decided not to require speed recorders. 44 Fed. Reg. 29,610-11 (1979); *see* note 19 *infra* & accompanying text.

[12] *See* 45 U.S.C. §434; H. Rep., *supra* note 6, at 11, 19, 75, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4108-09, 4116-17, 4130; note 15 *infra* & accompanying text.

[13] *Cf., e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981), *and Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (differing state rules on truck length); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (incompatible state rules on shape of trailer mudguards); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773-75 (1945) (differing state rules on train length).

to Congress's purpose of uniform national regulation.[14] It is contrary to Congress's purpose in passing the Railroad Safety Act to allow the states to reoccupy fields from which they previously had been displaced. Thus, I conclude that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act.

The state statute regulates locomotive equipment, an area totally preempted by the Locomotive Inspection Act. Therefore, to the extent that the state is attempting to regulate railroad common carriers within the jurisdiction of the Interstate Commerce Commission, *see* 45 U.S.C. §22, the state statute conflicts with federal law and violates the supremacy clause.

II. FEDERAL RAILROAD SAFETY ACT

Even assuming, however, that the proper test for preemption is that stated in the Railroad Safety Act, the Pennsylvania statute is still preempted. The Railroad Safety Act allows state railroad-safety regulation of areas not covered by the "subject matter" of a rule adopted by the federal government. Furthermore, a state may regulate railroad safety in the same area as the federal government if the

[14] *Cf. Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D. N.Y. 1964) (*Napier* "decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.") (Friendly, J.) (three-judge court), *appeal dismissed*, 382 U.S. 111 (1965) (no direct appeal to Supreme Court), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert denied*, 385 U.S. 1036 (1967).

state rule relates to "an essentially local safety hazard" and meets other conditions.[15]

The Federal Railroad Administration has adopted a rule governing speed indicators in locomotives.[16] That rule requires locomotives to be equipped with speedometers. Because the rule does not require speed recorders, *compare* note 16 *supra* (federal rule), *with* note 1 *supra* (state statute), the state argues that its statute does not cover the same "subject matter" as the federal rule. Furthermore,

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[15] The exact language of the preemption section is:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the same subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434.

[16] The rule provides:

> (a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a speed indicator which is—
>
> (1) Accurate within ±3 miles per hour of actual speed at speeds of 10 to 30 miles per hour and accurate within ±5 miles per hour at speeds above 30 miles per hour; and
>
> (2) Clearly readable from the engineer's normal position under all light conditions.

49 C.F.R. §229.117(a) (1980). Subsection (b) provides for testing the speedometer as soon as possible after departure.

the state contends that even if the subject matter is identical, the state law fits within the local-safety-hazard exception.

A speed recorder, "[i]n essence, . . . is a recording speedometer."[17] The speedometer and speed recorder often are incorporated in the same device, a fact recognized by the state statute.[18] Federal regulators thought speedometers and speed recorders belonged to the same subject matter. The Federal Railroad Administration discussed proposed speedometer and speed-recorder regulation under the same heading. *See* 39 Fed. Reg. 4929 (1974) (advance notice of proposed rulemaking).[19] This view of both devices as part of a unitary subject was shared by the Pennsylvania legislature, which regulated speedometers and speed recorders in the same sentence of the statute. *See* 66 Pa. Cons. Stat. §2705(a); note 1 *supra*. I hold that regulation of speedometers and speed recorders is regulation of the same "subject matter"—speed indication or speed control. Because state and federal rules cover the same area, the Railroad Safety Act preempts the state law unless it is saved by the local-hazard exception.

The state statute, however, does not relate to a local safety hazard and makes no attempt at localization. On its face, the statute does not relate to a local problem. Speed indication, speed recording, and accident reconstruction

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[17] *Adkins v. Dirickson*, 523 F. Supp. 1281, 1283 (E.D. Pa. 1981), *appeal docketed*, No. 82-1108 (3d Cir. Feb. 24, 1982); *see* Conrad, *The Tachograph As Evidence of Speed*, 8 Wayne L. Rev. 287, 288-91 (1962).

[18] *See* 66 Pa. Cons. Stat. §2705(a) (requiring "a device or devices"); note 1 *supra; see also* sources cited in note 17 *supra*.

[19] The proposed recorder regulations later were dropped. 44 Fed Reg. 29,610-11 (1979) (notice of rulemaking).

generally affect interstate commerce and are national problems subject to national regulation. *See, e.g.*, 44 Fed. Reg. 29,610-11, 29,617 (1979); 39 Fed. Reg. 4929 (1974).

The state, however, argues that even if the law is not local in its language, it is local in intent and effect. The local hazard that the legislature intended to minimize is an allegedly unique, statewide problem resulting from the presence of hundreds of miles of high-speed railroad lines. *See* State's Brief, *supra* note 5, at 9. It is recognized that these high-speed lines cross Pennsylvania's borders and form part of the northeast corridor rail system. In *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir. 1976), the state also argued that a statewide hazard was local. There, plaintiffs (including the Pennsylvania Public Utility Commission, *see id.* at 12), challenged preemption of state accident-reporting requirements by federal regulations. One argument advanced by plaintiffs was that statewide requirements were "expressly excepted under the savings clause of Section 434." *Id.* at 14. That argument was "devoid of merit" then, *id.*, and is devoid of merit now.[20] Therefore, I hold that the state statute is not exempt from preemption under the Railroad Safety Act.

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[20] For instance, the House Report states: "Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter." H. Rep., *supra* note 6, at 19, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4117; *see National Ass'n of Regulatory Util. Comm'rs*, 542 F.2d at 14-15.

III. CONCLUSION

It would be constitutionally impermissible to apply 66 Pa. Cons. Stat. §2705 to railroads, such as plaintiff, which are subject to federal jurisdiction under the Locomotive Inspection Act or the Railroad Safety Act.

An appropriate order follows.

JUDGMENT

AND NOW, this 13th day of April, 1982, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED.

2. JUDGMENT hereby is entered in favor of plaintiff and against defendants.

3. It is declared that 66 Pa. Cons. Stat. §2705 (1978) is preempted by 45 U.S.C. §23 (1976), and by 45 U.S.C. §434 (1976) and 49 C.F.R. §229.117 (1980), and therefore, as applied to plaintiff, violates the supremacy clause, U.S. Const. art. VI, cl. 2.

BY THE COURT:

(s) James T. Giles

J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1313

CONSOLIDATED RAIL CORPORATION

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission

Pennsylvania Public Utility Commission,

Appellant

Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 80-3147)

Argued

November 16, 1982

Before: ALDISERT, SLOVITER, AND ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable James T. Giles in *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, No. 80-3147 (E.D. Pa. April 14, 1982); it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,
(s) Aldisert
Circuit Judge

Attest:
(s) N. Elizabeth Ferguson
Chief Deputy Clerk

DATED: November 16, 1982

APPENDIX D

United States Court of Appeals
For the Third Circuit

No. 82-1313

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission

Pennsylvania Public Utility Commission,

Appellant

(E.D. Pa. Civ. No. 80-3147)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) Aldisert
Judge

Dated: DEC 13 1982

APPENDIX E

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, Pa. 17120

February 10, 1983

In Reply Please
Refer to Our File

Sally Mrvos, Clerk
U.S. Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
ET AL.

CIVIL ACTION NO. 82-1313

Dear Ms. Mrvos:

Please find enclosed pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States a

copy of the Pennsylvania Public Utility Commission's Notice of Appeal in the above-captioned case.

Very truly yours,
(s) John J. Gallagher
John J. Gallagher
Assistant Counsel

JJG:wm
Enclosure

UNITED STATES COURT OF APPEALS
For the Third Circuit

CIVIL ACTION
No. 82-1313

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Pennsylvania Public Utility Commission, defendant, hereby appeals to the United States Supreme Court pursuant to 28 U.S.C. §1254 (2) from the judgement order of the United States Court of Appeals for the Third Circuit, entered November 16, 1982 (petition for rehearing denied December 13, 1982) affirming the judgement of the United States District Court for the Eastern District of Pennsylvania.

(s) John J. Gallagher
John J. Gallagher
Assistant Counsel
Charles F. Hoffman
Chief Counsel
Attorneys for Pennsylvania
Public Utility Commission

G-28 North Office Building
P.O. Box 3265
Harrisburg PA 17120
(717) 783-2840

DATED: February 10, 1983

CERTIFICATE OF SERVICE

I hereby certify that I am, this 10th day of February, 1983 serving by first class mail, postage prepaid, a copy of the foregoing Notice of Appeal of the Pennsylvania Public Utility Commission upon the persons listed below:

Henry H. Perrett, Jr., Esquire
Hermon M. Wells, Esquire
John R. Jenchura, Esquire
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Thomas P. Shearer, Esquire
711 Frick Building
Pittsburgh, PA 15219

(s) John J. Gallagher
John J. Gallagher
Assistant Counsel

Dated at Harrisburg, Pennsylvania
this 10th day of February, 1983.